

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT HENRY,
Petitioner,
v.
ROBERT BURTON,
Respondent.

No. 2:22-CV-0609 KJM DB

FINDINGS AND RECOMMENDATIONS

Petitioner Robert Henry, a state prisoner, proceeds pro se and in forma pauperis with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction for murder entered in 1986 in the Solano County Superior Court. For the reasons set forth below, this Court recommends dismissing the petition for lack of jurisdiction.

I. Background

In 1986, a jury convicted petitioner of first degree murder on theories of aiding and abetting and transferred intent. (ECF No. 13-5 at 226.) The jury also found as true special allegations that petitioner was armed with a firearm during the offenses and carried out the murder intentionally and for financial gain. The trial court sentenced him to life imprisonment without the possibility of parole. (*Id.*)

In 1988, the state appellate court affirmed the judgment. (ECF No. 13-3 at Ex. 1.) Petitioner sought review in the California Supreme Court, which denied his petition for review

1 and petition for state habeas corpus. (Id. at Exs. 2 & 3.)

2 In 1994, petitioner filed a federal habeas petition. Following remand from the Ninth
3 Circuit, the district court held an evidentiary hearing in April 2009 to address whether petitioner
4 had a freestanding claim of actual innocence and whether petitioner's newly discovered evidence
5 would suggest that his claim is credible. See Henry v. Marshall, 224 F. App'x 635, 637 (9th Cir.
6 2007); Henry v. Marshall, No. CIV S-94-0916 JKS EFB P, 2010 WL 2179896 (E.D. Cal. May
7 27, 2010). The district court found that "petitioner's newly discovered evidence is not credible
8 and that petitioner has not met his burden of affirmatively proving that he is probably innocent,"
9 recommending that his habeas petition be denied. Id. The district judge adopted the findings and
10 recommendations in full, and the Ninth Circuit denied petitioner's requests for certificate of
11 appealability and to file a second or successive habeas corpus petition. See Order, Henry v.
12 Marshall, No. 12-70618, (9th Cir. May 8, 2012), ECF No. 2; Order, Henry v. Marshall, No. 10-
13 17206, (9th Cir. May 15, 2012), ECF No. 7.

14 In January 2013, petitioner filed a habeas petition in the Solano County Superior Court,
15 claiming that new evidence discovered in the 2009 evidentiary hearing held by the United States
16 District Court for the Eastern District of California supports that Brewer intentionally shot and
17 killed Johnson for his own motives. (ECF No. 13-4 at 234–35.) The state court denied the claim
18 as untimely and for failing to state a prima facie case for relief. (Id.) He subsequently filed a
19 second habeas petition before the same court in October 2016, which the court denied as
20 successive. (Id. at 236–38.)

21 In October 2017, petitioner filed a third state habeas petition, restating his prior claims and
22 arguing that he is also entitled to relief under recently amended California Penal Code section
23 1473 regarding newly discovered evidence. (ECF No. 13-4 at Ex. 4.) The state court issued an
24 order to show cause addressing petitioner's claims and ordered an evidentiary hearing.¹ (Id. at
25

26 ¹ "At the evidentiary hearing, Petitioner presented testimony from Jeffrey Taggart and took the
27 stand himself to testify. Additionally, Petitioner submitted the former testimony of Pamela
28 Conyers and Charles Austin from the trial of Francis Lee Brewer, excerpts of the testimony of
Francis Lee Brewer from Petitioner's 2009 Federal Court hearing, transcript notes of Detective
Bawart's interview of Jeffrey Taggart, portions of the testimony of Detective Bawart and the

264–65, 331–32.) The state court denied habeas relief, finding that most of the evidence was not new and not credible. (*Id.* at 540–43.) “The enhanced audio tape of the interview of Jeffrey Taggart is new evidence, but does not substantially alter the substance of his original trial testimony implicating Petitioner and his role in the death of Andre Johnson.” (*Id.* at 542.)

In 2020, petitioner filed a state habeas petition in the California Court of Appeal. (ECF No. 13-5 at Exs. 5 & 6.) The state court denied relief. (ECF No. 13-5 at 226–49); *In re Robert Henry*, No. A160596, 2021 WL 4451345 (Cal. Ct. App. Sept. 29, 2021). Petitioner filed a state habeas petition in the California Supreme Court, which the court denied. (ECF No. 13-5 at Exs. 7 & 8.)

He filed the present habeas petition on April 4, 2022. (ECF No. 1.) Respondent filed an answer. (ECF No. 13.) Petitioner filed a traverse. (ECF No. 14.)

II. Analysis

The Antiterrorism and Effective Death Penalty Act imposes strict requirements on when state prisoners can bring second or successive petitions to challenge being in custody under a state court judgment. *See* 28 U.S.C. §§ 2244(b), 2254(a); *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (per curiam). A petitioner must obtain an order from the court of appeals authorizing a second or successive habeas petition before filing the petition in the district court. *See* 28 U.S.C. § 2244(b)(3)(A); *Magwood v. Patterson*, 561 U.S. 320, 330–31 (2010). “A habeas petition is second or successive only if it raises claims that were or could have been adjudicated on the merits.” *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). “[A] claim ‘is successive if the basic thrust or gravamen of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments ... [or] proved by different factual allegations.’” *Hooper v. Shinn*, 56 F.4th 627, 633–34 (9th Cir. 2022) (internal citations omitted). Without an

People’s closing arguments from his own trial, and an enhanced audio recording of the same interview between Detective Bawart and Jeffrey Taggart in support his claim. The Respondent submitted two photographs of autos connected with the subject incident, a cassette tape of an interview between Detective Bawart and Petitioner at the time of arrest, and full transcripts of testimony of Francis Lee Brewer and Petitioner from the same 2009 Federal hearing. Both Petitioner and Respondent further agreed that the transcripts from Petitioner’s 1986 jury trial could be considered in its entirety by the Court.” (ECF No. 13-4 at 540–41.)

order from the court of appeals, the district court does not have jurisdiction to consider a second or successive habeas petition. Burton, 549 U.S. at 152; Ybarra v. Filson, 869 F.3d 1016, 1022 (9th Cir. 2017). And even after obtaining leave, “a claim presented in a second or successive petition that was not presented in a prior application ‘shall be dismissed unless’ certain criteria are met.” Gonzalez v. Sherman, 873 F.3d 763, 767 (9th Cir. 2017). “Even if a petitioner can demonstrate that he qualifies for one of these exceptions, he must seek authorization from the court of appeals before filing his new petition with the district court.” Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008).

Petitioner’s first federal habeas petition, filed in 1994, challenged being held in custody pursuant to 1986 state court judgment. After an evidentiary hearing, the district court denied the petition on the merits. See Henry, 2010 WL 2179896 (E.D. Cal. May 27, 2010). His current federal habeas petition, filed in 2022, also contests the same state court judgment. See Gonzalez v. Crosby, 545 U.S. 524, 530 (2005). Because petitioner was required to seek and obtain authorization from the Ninth Circuit before filing this petition, but failed to do so, this Court lacks jurisdiction to consider it. Absent such authorization, the instant habeas petition must be dismissed without prejudice.

III. Conclusion

For the reasons set forth above, IT IS HEREBY RECOMMENDED that the petition be dismissed for lack of jurisdiction.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty (30) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served on all parties and filed with the court within seven (7) days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In the objections, the party may address whether a certificate of

1 appealability should issue in the event an appeal of the judgment in this case is filed. See Rule 11,
2 Rules Governing § 2254 Cases (the district court must issue or deny a certificate of appealability
3 when it enters a final order adverse to the applicant).

4 Dated: June 29, 2023

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DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE